# Office of Chief Counsel Internal Revenue Service **memorandum**

CC:SB:2:PIT:FAFalvo Post S-121635-05

date: July 15, 2005

to: W. Ricky Stiff

Chief, Excise Tax Program

from: Frank A. Falvo Senior Attorney

(Small Business/Self-Employed)

subject:

Request for Advice

This responds to your request for assistance dated April 1, 2005. This memorandum should not be cited as precedence.

#### ISSUE

Whether the taxpayer is the importer for purposes of the excise tax imposed by I.R.C. § 4161.

## CONCLUSION

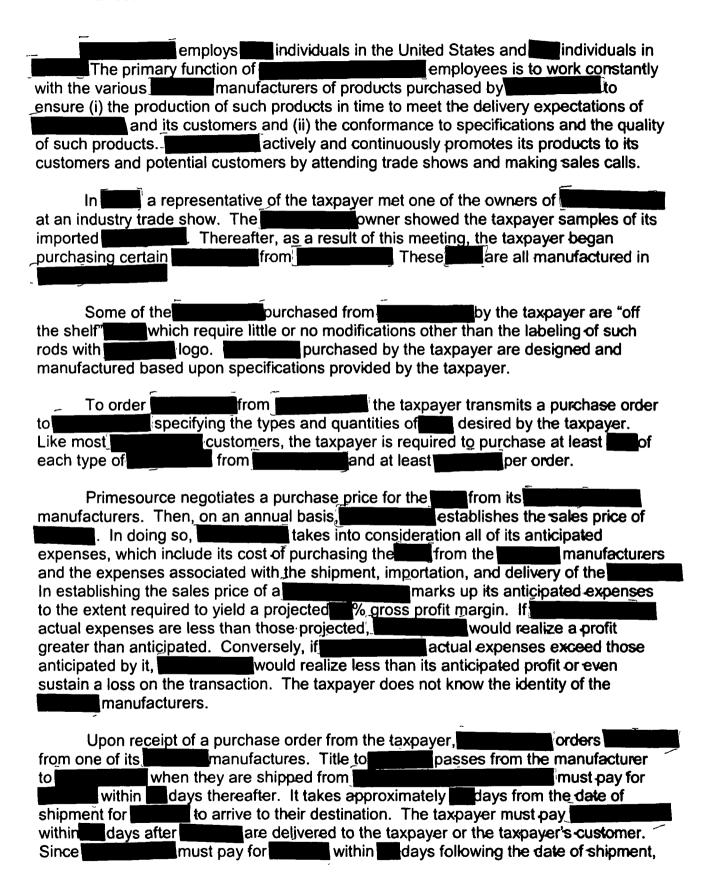
The taxpayer is not the importer.

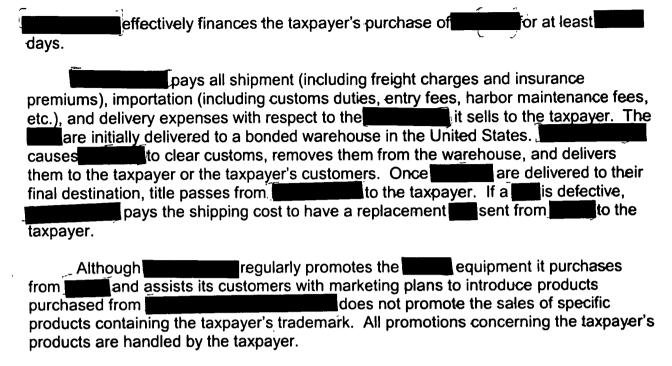
# **FACTUAL BACKGROUND**

All factual information set forth herein has been provided or verified by the excise tax agent.

	, is engaged in the business of manufacturing an	ď
distributing certain	equipment, The taxpayer	
manufactures some	and contracts with third parties for the manufact	ure
of sold by the tax	payer are labeled with its trademark name. In or	
around the taxpayer bega	an purchasing	
	manufactured in:	
is a domest	tic importer of the second equipment headquartered	l in
with additional offices in		<u>ave</u>
extensive experience in the spo	ort fishing industry.	
equipment from approximately	manufacturers in the state of t	is
equipment and sells to	domestic customers.	

PMTA: 00729





### DISCUSSION

Section 4161 imposes a tax on the sale of any article of equipment by the manufacturer, producer or importer. Section 48.4161-1(c) provides that the tax imposed by section 4161(a) is payable by the manufacturer, producer, or importer who makes the sale.

Section 48.0-2(a)(4)(i) defines an importer as any person who brings a taxable article into the United States from a source outside the United States, or who withdraws a taxable article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of the taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the importer of the article and liable for tax on its sale or use of the article in the United States. Section 48.0-2(a)(5) defines sale as an agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or other things.

Rev. Rul. 56-409, 1956-2 C.B. 769, holds that a person who withdraws taxable articles from a customs bonded warehouse for sale or use in the United States is the "importer" for purposes of the manufacturers excise taxes. This ruling was amplified by Rev. Rul. 67-209, 1967-1 C.B. 297, which held that it is necessary to look through the form to the substance of the transaction to determine whether the nominal importer actually functions as a typical import merchant, or merely serves in a representative capacity, charged only with the responsibility for bringing the goods into the commerce of the United States, after a sale contract has been negotiated independently by the principals involved.

In Rev. Rul. 68-197, 1968-1 C.B. 455, the Service held that an importer is the person who as principal and not as agent arranges for, or is the inducing and efficient cause of, the goods being brought into the United States for the purposes of sale or use by him. The passing of title to the goods, either at the time of shipment or upon arrival in this country, is not controlling.

In Rev. Rul. 82-40, 1982-1 C.B. 175, X is a foreign corporation that manufactures various fishing equipment. P, also a foreign corporation, unrelated to X, is a trading company engaged in the export business. P is the exclusive exporter of X's products. S, a domestic subsidiary of P, is engaged in international trade. An arrangement was made under which S acts as the importer of X's products in the United States and sells them to Y, a corporation created to act as the exclusive domestic wholesale distributor of X's fishing equipment in the United States.

When Y places an order with S, S has the right to accept or reject the order and to limit the quantity ordered. S maintains no inventory of fishing equipment and imports rods and reels only as they are needed by Y. The price of the goods to Y is determined at the time an order is accepted, and the risk of any fluctuation in price or importation cost is borne by S. In addition, S assumes any risk for defective merchandise delivered to Y and must seek restitution from its supplier, P. Title to the fishing equipment passes to Y at the port of entry after it has cleared customs. Y must pay S for the merchandise within 120 days of the issuance of the bill of lading. S incurs the risk of price changes after acceptance of Y's order. The entire cost of importation, including credit arrangements, is borne by S. The Service ruled that S is the inducing and efficient cause of the importation of the fishing equipment and is the importer of the rods and reels.

The ruling states that generally, the basis for computing the manufacturer's excise tax is the actual selling price of the article. If, however, an article is sold, otherwise than through an arms length transaction at less than a fair market price, the tax must be based on a constructive sale price under § 4216(b). Section 48.4216(b)-2(e) of the regulations states that a sale is considered to be otherwise than at arm's length if (1) one of the parties is controlled (in law or in fact) by the other, or there is common control, whether or not such control is actually exercised to influence the sale price, or (2) the sale is made under special arrangements between a manufacturer and a purchaser. A special arrangement exists when there are factors other than control that indicate there is no adverse economic interest between the parties to a transaction. A lack of adverse economic interest does not necessarily exist because all parties to a transaction may benefit in some way, for example, having an assured market or source of supply or earning a profit.

•	The factual circumstances in the case at issue are similar to the facts in Rev.	Rul.
82-40.	is engaged in the business of importing equipment. It h	าลร
numero	bus suppliers and domestic customers. It is not in any way controlled by the	
taxpay	er. State of the s	ſhe

taxpayer has no direct contact with the manufacturers and states it does not even know their identities. bears the risk of loss on the transaction with the taxpayer. It incurs all expenses relating to product costs, shipment, importation and delivery.

In <u>Corex Corporation v. United States</u>, 524 F.2d 1017 (9<sup>th</sup> Cir. 1975), the court determined that a party was not the importer because it performed no substantial promotional activities, bore none of the usual risks associated with shipments in transit, performed no function other than as a conduit and earned little profit. The court in <u>Import Wholesalers Corp. v. United States</u>, 368 F.2d 577, 583 (Ct. Cl. 1966), stated that the determination of who is the importer does not turn on technical rules such as the law of sales, but rather on the realities as to who arranges as principal and not as agent for the articles to be imported into the United States. The court disregarded the intermediary because its only act was to place the importer's order with the seller.

In contrast performs a substantial function in the importation of the
After receiving an order from the taxpayer (or one of its other customers),
purchases the from a manufacturer, and arranges for and
pays all shipping costs, duties, tariffs, etc.
associated with the importation of the rods. It charges the taxpayer a fixed amount for
the goods, which amount is determined annually. If it miscalculates its anticipated
expenses; suffers the resulting loss. According to the taxpayer, during
incurred unanticipated shipping expenses of \$ 1000 on one
transaction because certain production delays caused by the manufacturer of
which sold to the taxpayer necessitated expensive air
shipment of the This unanticipated expense was borne solely by the and and
caused it to realize a loss on the transaction. In addition, and also bears the
risk of loss from the late payment or nonpayment by the taxpayer. The taxpayer states
that in a second lost over \$ in anticipated profits on one transaction
because of the taxpayer's late paymentalso pays all shipping and
handling costs related to the replacement of defective delivered to the taxpayer.
Unlike the agents who handled the importation of goods in the <u>Corex</u> and <u>Import</u> cases,
is not merely a conduit or nominee for the taxpayer, but is the principal
responsible for importing into the United States.

The factual situation in this case also resembles the facts set forth in <u>Sony Corp. of America v. United States</u>, 428 F.2d 1258 (Ct. Cl. 1970). In that case, Sony of Tokyo ("Tokyo") designated Agrod Corp. as the exclusive distributor of its products in the United States. Agrod subdistributed to Sony of America ("America"). America would place an order with Agrod, who then placed an order with Tokyo. Agrod arranged to deliver or store the merchandise and made all payments associated with freight, customs, insurance and bonds.

The court held that Agrod was the importer. In doing so, the court looked to Tokyo's reliance on Agrod's knowledge of the market, its promotional activities and

efforts in introducing new products, the risk of loss borne by the agent, and the inclusion of the agent in the chain of title.
has extensive equipment experience and is engaged in the business of importing equipment. Each acquired title to the goods upon their shipment from and maintained title until delivered to the taxpayer. This is standard commercial practice that applies to all of its imported goods.
In <u>Sony</u> , one factor relied upon by the court was that the importer provided promotional activities with respect to the imported products. Admittedly, did not promote the products which bore the taxpayer's logo. We do not believe that the absence of this factor is fatal to the determination that is the importer. The taxpayer choose to promote and market its own products. It apparently made a business decision that it did not need assistance in this regard.  In the did not product that it did not need assistance in this regard.  In the did not product the other products which it imported. The absence of this single factor is not controlling in determining whether is the importer. That is but one factor among the totality of the circumstances that must be considered to make the appropriate determination.
We believe the facts and circumstances relating to the transactions between the taxpayer and reflect arms-length dealings. acted not merely as an agent or conduit for the taxpayer, but as the inducing cause of the importation.
Based upon the foregoing, we believe that not the taxpayer, is the importer of the foregoing for purposes of the tax imposed by § 4161.
This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.
Please contact me at (412) 644-3417 if you have any questions.
Frank A. Falvo Senior Attorney (Small Business/Self-Employed)